

# ZELLE HOFMANN VOELBEL MASON & GETTE

A LIMITED LIABILITY  
PARTNERSHIP

## Partners

- Joseph W. Bell
- Roger D. Branigin
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- Michael R. Cashman
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- Patricia St. Peter
- John C. Steele
- Richard G. Urquhart
- Karl S. Vasiloff
- Richard L. Voelbel
- Lawrence Zelle

## Appellate Advocacy

Zelle Hofmann attorneys have successfully litigated scores of appeals resulting in many important appellate decisions on fundamental issues of law. These include the following:

- The extent of federal question jurisdiction over state law land disputes
- Application of Daubert principles to custom and practice testimony
- The enforceability of indemnity agreements releasing construction contractors from their own negligence
- Applicability of suit limitation provisions in property insurance policies.
- Whether the costs incurred for asbestos abatement/removal are insurable under a property insurance policy.
- Whether an EPA letter constitutes a suit.
- Whether a class can be certified in real estate dispute involving thousands of similarly-situated property owners
- Whether the sudden and accidental pollution exclusion bars claims for gradual pollution.
- Whether the owned property exclusion bars coverage for pollution.
- Whether governmental agency response costs are damages.
- Proof of lost profit damages for tortious interference with the business of a start-up company
- Whether environmental claims are covered under personal injury coverage.
- Whether patent, copyright, and trademark claims are covered under advertising injury coverage.
- Whether late notice bars coverage.
- Whether voluntary payments are covered.
- Whether pre-tender defense costs are covered.
- Whether a transaction constitutes a merger or an acquisition in the D&O context.
- Whether third parties may recover for "bad faith" under med pay provisions.
- The rights and responsibilities of outside consultants representing property insurance claimants.
- Defense and indemnity allocation issues between insurers.



## **Banking & Financial Institution Litigation**

### Partners

- Michael R. Cashman
- Lawrence T. Hofmann
- Daniel S. Mason
- Christopher T. Micheletti
- John C. Steele

Zelle Hofmann has served banking and financial institution clients since its inception. The firm has deep experience in virtually every type of dispute which banks and financial institutions face, including:

- credit card practices
- mortgage lending practices
- investment mismanagement claims
- employment-related claims
- non-compete disputes
- claims against trustees
- antitrust issues
- class action claims
- regulatory investigations
- director and officer liability claims
- disputes involving receiverships and conservatorships
- bondholder disputes
- contract disputes
- intellectual property disputes



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## **Class Actions**

Zelle Hofmann attorneys represent both plaintiffs and defendants in a variety of class action matters. Zelle Hofmann attorneys have represented consumers, investors, businesses and others in class actions involving antitrust, securities fraud, financial services, consumer rights, unfair competition, unfair business practices, product liability, mass tort, ERISA and other claims.

### **Case summaries of class action matters.**

## **Examples of Class Action Cases**

***Fiber Optic Right-of-Way Cases (Multiple State and U.S. Federal Courts).*** In these actions, plaintiff class members allege that the defendant telecommunications companies installed fiber optic cable on or next to railroad, pipeline, energy, or other utility companies' rights-of-way which run through the class members' property and that defendants' installation, maintenance, and operation of their telecommunications networks without the plaintiff class members' consent constitute a trespass that has unjustly enriched defendants. Zelle Hofmann attorneys and their co-counsel have obtained certification on plaintiff classes and settlements have been reached with certain defendants on certain claims.

***Fiduciary duty claims (Cal. Super. Ct., San Francisco Cty.).*** Zelle Hofmann attorneys represented a corporation in this shareholder class action charging breach of fiduciary duty in connection with the consolidation of a number of limited partnerships. An important issue in the case was whether a breach of fiduciary duty claim can be asserted where full disclosure was made to shareholders and their approval was obtained before the corporation took the actions which are asserted to be breaches of duty. The case was settled.

***Head Lice Treatment Litigation (Cal. Super. Ct., San Francisco).*** An action asserting breach of warranty and related claims in connection with four of the leading products sold as treatments for head lice infestations. The complaint alleges that since at least as early as 1995, various head lice treatment products have become ineffective for the treatment of head lice as a result of head lice developing resistance to the insecticides contained therein. The lawsuit claims that defendants nevertheless continue to manufacture and sell the products and to represent and warrant to consumers that the products are effective in killing lice and their eggs. The action seeks damages, restitution, injunctive relief, punitive damages and other remedies.

***In re Trans Union Privacy Litigation (N.D. Cal., N.D. Ill.).*** An action on behalf of a nationwide class alleging violations of the federal Fair Credit Reporting Act and unfair competition under California state law. The lawsuit alleges that a credit bureau retrieves private credit information from its credit databases, generates lists of consumers who have specific credit-based traits, and unlawfully sells those lists to target marketing and advertising firms for a substantial profit. The action seeks injunctive relief, statutory, punitive and other damages, disgorgement of profits and other remedies. This case and others have been consolidated before a single judge in the Northern District of Illinois.

***Industrial Revenue Bond Litigation (D.Ariz.).*** This was a securities fraud class action by purchasers of industrial revenue bonds that were intended to finance the development of a residential care facility and nursing home. Zelle Hofmann attorneys represented the plaintiff class. The case was settled on a favorable basis, against most of the defendants, along with a related case involving a separate, but similar bond issue.

***Mortgage Fund Limited Partnership Litigation (D.Ariz.).*** This was a securities fraud class action by purchasers of limited partnership interests in blind pool mortgage funds. The complaint alleged an elaborate Ponzi scheme whereby monies obtained from investors were used to pay distributions to investors in prior limited partnerships. Zelle Hofmann attorneys represented the plaintiff class. This case settled while summary judgment motions were pending.

***Real Estate Limited Partnership Litigation (N.D.Tex.).*** This was a securities fraud class action by purchasers of interests in 121 limited real estate partnerships. Zelle Hofmann attorneys, together with two other counsel, represented the class. The district court's opinions granting class certification and denying summary judgment are highly favorable to securities plaintiffs and deal with a host of important issues, such as class-wide proof of reliance and causation, typicality of claims, statutes of limitations, scienter and materiality. The case was settled favorably for the class.

***Shareholder Litigation (Del.Ch.).*** Zelle Hofmann attorneys represented the chief executive officer and another officer in this class action against them for breach of fiduciary duty in connection with a leveraged buyout. The case was settled in the midst of intensive discovery related to plaintiffs' motion for a preliminary injunction.

***Tucker Act Right-of-Way Cases (Multiple U.S. Federal Courts).*** Zelle Hofmann attorneys and their co-counsel are prosecuting several class action lawsuits which challenge the authority of the U. S. Government to take and use property under the Tucker Act (28 U.S.C. 1491). The Surface Transportation Board (STB) has established a policy of "Railbanking" whereby the government asserts an interest in certain abandoned railroad rights-of-way for the purpose of preserving them as transportation corridors. Theorizing that the now abandoned corridors may be needed again for transportation purposes in the future, the government has taken possession of several thousand miles of abandoned railroad rights-of-way. In many cases, the STB has classified the abandoned right-of-way for an "alternative use" which almost always involves the designation of the abandoned right-of-way as a recreational trail.

At the time of their construction, railroads often took deeds for their rights-of-way which provided that, should the right-of-way ever become abandoned, the interest in the real estate which formed the right-of-way would revert back to the underlying or adjoining property owners. Zelle Hofmann attorneys and their co-counsel are representing classes

of property owners whose deeds include such reversionary interests, and are challenging the government's taking of these rights-of-way as improper.

*Winery Limited Partnership Litigation (Cal. Super. Ct., Sonoma Cty.).* Zelle Hofmann attorneys represented a plaintiff class in this securities fraud case brought on behalf of a nationwide class of investors in limited partnerships formed to purchase and operate wineries. The case was settled favorably to the class.



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## Complex Business Litigation

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Zelle Hofmann attorneys represent litigants in virtually all areas of business litigation. The Firm has extensive trial experience in complex business litigation matters in state and federal courts, and before foreign and domestic arbitration panels. Our clients range from individuals and small businesses to Fortune 100 corporations. Our experience in large-scale complex litigation throughout the United States and abroad enables our clients to manage and resolve substantial national and international litigation efficiently.

In addition to the matters described elsewhere in the Firm's web site, the Firm's business litigation practice includes, among others, cases involving business torts, contractual disputes, dissolution proceedings, employment law, environmental law, entertainment law, fiduciary matters, insurance matters, international law, international arbitration, libel, officers and directors liability, professional services liability, slander, stock option disputes and other stock-related disputes, trade disparagement, unfair business practices and unfair competition.

### Case summaries of business litigation matters



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- Brett A. Wallingford
- Durwood J. Zaelke
- Lawrence Zelle



## **Examples of Complex Business Litigation Matters**

***ABA 2000, ABA Founders LLC, ABA Operations LLC v. Mizlou Television Network, Inc. (C.D. Cal.)***. Zelle Hofmann attorneys represent the professional basketball organization in a suit filed against an alleged independent television network for breach of contract and intentional interference with prospective business relationships. The case includes allegations that Mizlou Television Network interfered with the ABA plaintiffs' negotiations for the national television broadcast of their playoff games.

***Weyerhaeuser Co. v. Thermogas Co., 620 N.W.2d 819 (Iowa 2000)***. Zelle Hofmann attorneys represented Weyerhaeuser Co. in this action for negligence, strict liability, breach of contract and breach of express and implied warranties based upon allegation that a liquid petroleum fuel tank exploded prematurely. Weyerhaeuser asserted that the tank was defective, and that were it not defective, the tank would have withstood a fire at its facility for the three minutes it took the fire fighters to arrive on scene. Over Weyerhaeuser's objection, the trial court permitted the jury to consider Weyerhaeuser's comparative fault, and the jury found Weyerhaeuser 70% at fault for the damages it suffered. On appeal, the Iowa Supreme Court reversed, agreeing with Weyerhaeuser that the district court erred in (1) directing a verdict for the tank distributor on Weyerhaeuser's claims of strict liability and breach of implied warranty of merchantability, (2) refusing to instruct the jury that the cause of the fire was legally irrelevant with respect to the negligence of Weyerhaeuser, and (3) refusing to give the jury a res ipsa loquitur instruction on Weyerhaeuser's negligence claim against the tank distributor.

***Business tort, breach of contract, unfair competition action (N.D.Cal., Cal. Super. Ct., San Francisco Cty., Cal. Super Ct., Contra Costa Cty.)***. Zelle Hofmann attorneys represent a corporate client in a number of cases involving claims for breach of fiduciary duties, fraud, fraudulent concealment, breach of contract, malicious prosecution, interference with prospective economic advantage, unfair competition and conspiracy to breach fiduciary duties. They are also defending the same client against claims by the defendant and other parties, which include allegations of unfair competition, private nuisance, interference with prospective economic advantage and business relations, and wrongful termination of employment.

***Breach of contract, licensing agreement (N.D.Cal.)***. Zelle Hofmann attorneys represent a Silicon Valley company in a contractual dispute arising out of certain licensing agreements.

***Business tort and other claims arising out of sale of business (N.D.Cal. and American Arbitration Association, San Francisco, California).*** Zelle Hofmann attorneys represented a party in an arbitration proceeding and in a federal court proceeding involving disputes surrounding the sale of part of a business. The case includes allegations of fraud, negligent misrepresentation, breach of fiduciary duty and securities violations.

***Chrysler Corporation v. Iacocca (Mich. Cir. Ct., Oakland Cty.); Iacocca v. Chrysler Corporation (Cal. Super. Ct., Los Angeles, Cty.).*** Zelle Hofmann attorneys represented Chrysler Corporation in disputes concerning Lee Iacocca's alliance with Kirk Kerkorian in alleged corporate control matters, as they related to litigation concerning Mr. Iacocca's Chrysler stock options. Shortly after Zelle Hofmann attorneys succeeded in obtaining the dismissal of Mr. Iacocca's California action against Chrysler, the matter was settled.

***Business tort, breach of contract, unfair competition action (Cal. Super. Ct., San Francisco Cty.).*** Zelle Hofmann attorneys represented a plaintiff food company in a complex action for breach of contract, fraud, negligence and interference with business relations. The plaintiff alleged that various defendants failed to promote its food products as required by certain contractual, fiduciary and other obligations, and that they interfered with ongoing and prospective business relationships of the plaintiff. The matter settled prior to trial.

***Breach of contract – arbitration action (American Arbitration Association, Dallas, Texas).*** Zelle Hofmann attorneys represented a party in a binding arbitration before a single arbitrator of the American Arbitration Association. This arbitration arose out of the sale of the stock of a company by our client and others to another company. The latter company sought to recover a portion of an escrow fund that was created pursuant to the stock purchase agreement.

***Fiduciary duty claims (U.S. Bankr. E.D.N.Y.).*** Zelle Hofmann attorneys represented a former chief executive officer and directors of a company in this action against them for, among other claims, breach of fiduciary duty in connection with a leveraged buy-out.

***Breach of contract, noncompetition clause action (M.D.Tenn.).*** Zelle Hofmann attorneys represented a manufacturer of sewing machines in a suit involving contractual disputes arising out of its purchase of defendant's business. A preliminary injunction was obtained concerning the parties' non-competition clauses. The case settled.



***Trade secret theft, trade disparagement action (Ill. Cir. Ct., Cook Cty, N.D.Ill., 7<sup>th</sup> Cir., C.D.Cal.).*** Zelle Hofmann attorneys represented one of the top financial printers in various litigation involving competitors in the same business category. The disputes concerned allegations of stealing trade secrets and employees, as well as trade disparagement and other violations. Settlements were reached in all cases.

***ERISA litigation (C.D.Cal. and 9<sup>th</sup> Cir.).*** This case involving issues of ERISA law, concerned the leveraged buyout of a corporation by a company ESOP and whether the persons who approved that transaction (which involved a consolidation of existing profit sharing plans) violated their fiduciary duties under ERISA.

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## Construction Litigation

Zelle Hofmann has been involved in more than 1,000 construction-related disputes including an exhaustive array of origins and legal issues, such as roof failure, fire, manufacturing plant explosions, building collapse, turbine and compressor failures, claims of construction defect, cost overruns, breach of contract, engineer negligence, bid-rigging, government contracts, etc. Zelle Hofmann has handled construction disputes in federal and state jurisdictions throughout the U.S. and abroad.

### Representative Matters

**9/11 World Trade Center.** Myriad of construction issues in determination of multi-billion dollar replacement costs.

**9/11 Deutsche Bank.** Total loss versus repair; time line for repairs; environmental remediation issues (involving asbestos and other contaminants, and concerning acceptable cleanup levels, *risk* analysis, etc.); issues pertaining to the integrity of existing building foundations.

**American National Power.** Construction defect case involving highly flammable cooling pads for use in a filter house that protected a gas turbine.

**Adco Group et al. v. Travelers et al.** (complex action involving the coordination of multiple lawsuits with over 25 parties, claims of \$250 million in construction defects and damage at a luxury resort in Southern California, and involving issues regarding the extent of construction defects, their cause, damage allegedly resulting from the defects and its manifestation, as well as the calculation of the reasonable cost of repairing the property)

**USF&G and AHAC v. Braspetro Oil Services Company and Petroleo Brasileiro S.A. - Petrobras, et al, (S.D.N.Y. 2002).** Multi-national, multi-hundred million dollar performance bond, construction, and indemnity dispute involving construction of offshore deep-water oil platforms.

**Columbus Municipal Airport Authority.** Multi-party latent construction defects dispute.

**Nicholson v. Turner/Cargile, 107 Ohio App. 3d 797, 669 N.E.2d 529 (Ohio App. 1995).** Alleged negligence of consulting engineer resulting in deaths of construction workers.

**C.J. Maban Construction Co. v. JMG Maintenance, Inc. and Kokosing Construction Co., Case No. 93CVC04-2925 (Franklin Cty. Ohio C.P. 1994).**